1981

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THE PROPRIETY OF GRANTING SUMMARY JUDGMENT FOR DEFENDANTS IN DEFAMATION SUITS INVOLVING ACTUAL MALICE

I. INTRODUCTION

The law of defamation requires an accommodation between two competing values held in esteem by American society. On the one hand, we hold our freedom of speech in high regard and recognize a profound commitment to uninhibited debate of public issues. On the other hand, we also protect the individual's interest in reputation by allowing a person whose reputation is injured by a defamatory falsehood to bring an action for damages. In the area of media comment...
on public officials or public figures the clash between these values is particularly acute — what is to be the balance struck when in the course of debate such an individual is defamed? While the protection of speech is not absolute, the law recognizes that the greater the risk of a defendant’s being held liable, the greater the adverse impact on the quality of the debate; a potential defendant may engage in self-censorship rather than risk exposure to liability in a defamation action.

In response to this fear of self-censorship, the United States Supreme Court has raised a constitutional barrier which public officials and public figures seeking compensation for injury to their reputations must hurdle. Such individuals must prove that the defendants made the defamatory statement knowing that it was false or in reckless disregard of its truth or falsity, i.e., with “actual malice.” This requirement has not, however, completely alleviated the fear of self-censorship.

Defamation law is comprised of the “twin torts” of libel and slander. W. Prosser, supra note 4, at 737. Slander deals with defamatory statements which are spoken; libel with those that are written. Id. The elements common to both causes of action which the plaintiff must plead and prove are: 1) the defamatory words themselves; 2) that the words were communicated to a person other than the plaintiff (the “publication”); 3) any extrinsic facts which give the statement its defamatory meaning (the “inducement”); 4) that the words referred to the plaintiff (the “colloquium”); 5) the defamatory meaning alleged (the “innuendo”); and 6) that pecuniary loss has been sustained by the plaintiff. W. Prosser, J. Wade & V. Schwartz, Cases and Materials on Torts 968 (6th ed. 1976). See also Restatement (Second) of Torts § 558 (1977).


See Leflar, The Free-ness of Free Speech, 15 Vand. L. Rev. 1073, 1080 (1962) (The framers did not intend the freedom of speech to be absolute, but rather only intended the first amendment to maintain the concept of free speech as it then existed). But see Rosenblatt v. Baer, 383 U.S. 75, 95 (1966) (Black, J., concurring in part and dissenting in part) ("The only sure way to protect speech and press . . . is to recognize that libel laws are abridgements of speech and press and therefore are barred in both federal and state courts by the First and Fourteenth Amendments").


10. Id.

For a discussion of the difficulty of surmounting this obstacle, see L. Eldredge, supra note 4, at 270-71.


13. Anderson, Libel and Press Self-Censorship, 58 Tex. L. Rev. 422, 456 (1975). The “actual malice” test does not protect the defendant until a suit has been brought to fruition; thus, knowing that he must risk the expense of the suit, a publisher may engage in self-censorship. Id. See also R. Sack, supra note 4; Oakes, Proof of Actual Malice in Defamation Actions: An Unresolved Dilemma, 7 Hofstra L. Rev. 655, 687-720 (1979).
may also result if a defendant is put to the expense of a lengthy trial, have been receptive to defendants’ motions for summary judgment on the issue of “actual malice.”¹⁴ In fact, this practice has developed to the point where some courts have characterized the granting of such motions as the rule, rather than the exception.¹⁵

More recently, however, the tone of the Supreme Court’s decisions in defamation cases¹⁶ and its criticism of the lower court practice of granting defendants’ summary judgment motions¹⁷ have disconcerted media law practitioners.¹⁸ The Court, in footnote nine to its decision in *Hutchinson v. Proxmire*,²⁰ stated:


₁⁶. See, e.g., Wolston v. Reader’s Digest Ass’n, Inc., 443 U.S. 157, 169-70 (1979) (Blackmun, J., concurring) (criticizing the majority for adopting a restrictive definition of “public figure”); Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979) (holding open the question whether the standard of actual malice applies to non-media defendants); Herbert v. Lando, 441 U.S. 153 (1979) (holding that the Constitution does not bar a libel plaintiff from inquiring into the editorial process and the state of mind of those responsible for the publication). For a discussion of Herbert, see note 74 infra. For a further discussion of the restrictive approach taken by Wolston, see note 73 infra.


₁⁸. For the purposes of this Comment, the term “media” includes television, radio, books, newspapers, and magazines. “Media Law” generally concerns itself with the problems unique to publishers and broadcasters, such as prior restraint, defamation, invasion of privacy, obscenity, federal and state regulation, and general first amendment issues. See generally 6 MEDIA L. REP. Topical Index (1980).

₁⁹. See 48 U.S.L.W. 2099 (1979) (comments of Floyd Abrams at a seminar on libel litigation held in New York in July 1979). In paraphrasing one practitioner’s lecture, Law Week reported:

There is no good news this year in libel law, “... The U.S. Supreme Court’s recent decisions in *Hutchinson v. Proxmire* ... and *Wolston v. Reader’s Digest Ass’n, Inc.* ... may not signal the end of summary judgments in libel actions against the media ... ” but libel litigation will now go beyond the constitutional law of libel. There is a tone and more in Justice Rehnquist’s opinion in Wolston that seems very, very, unhappy with the Court’s 1962 [sic] decision in New York Times v. Sullivan ... . We may have larger worries ahead than when you can get summary judgment.

Id. See also R. Sack, supra note 4, at 582. For a discussion of *Hutchinson*, see notes 108-20 and accompanying text infra. For a discussion of *Wolston*, see note 75 infra.

₂₀. 443 U.S. 111, 120 n.9 (1979). For a further discussion of footnote nine, see notes 108-20 and accompanying text infra.
Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule" of granting summary judgment in defamation actions involving "actual malice". The proof of "actual malice" calls a defendant's state of mind into question, and does not lend itself to summary disposition...21

This comment will outline defamation law as it existed before footnote nine; 22 discuss footnote nine and its effect upon the lower courts' handling of summary judgment proceedings; 23 and consider whether the practical result of such handling has been in accord with the apparent intention of this Supreme Court dicta. 24

II. BACKGROUND: DEFAMATION AND THE FIRST AMENDMENT — EMERGENCE OF THE ACTUAL MALICE STANDARD

The problem of reconciling the law of defamation with the protections of the first amendment 25 is one of relatively recent vintage. 26 Prior to the 1964 United States Supreme Court decision in New York Times Co. v. Sullivan, 27 defamation was not considered to be within the protections afforded by the first amendment to the freedoms of speech and of the press. 28 In Chaplinsky v. New Hampshire, 29 for example, the defendant argued that his first amendment right of free speech had been abridged when he was arrested for insulting a policeman. 30 In rejecting that argument, the Court noted that certain "classes" of speech — such as the "fighting words" used by Chaplinsky 31 — were not within the protection of the first amendment 32 and went on to note, in dictum, that libelous speech was such an unprotected class. 33

21. 433 U.S. at 120 n.9.
22. See notes 25-107 and accompanying text infra.
23. See notes 108-61 and accompanying text infra.
24. See notes 162-86 and accompanying text infra.
25. See note 2 supra.
29. 315 U.S. 568 (1942).
30. Id. at 570-71.
31. The Court defined "fighting words" as words likely to incite an immediate breach of peace. Id. at 573-74.
32. Id.
33. Id. at 571-72. For other cases recognizing one or more categories of unprotected speech, see, e.g., Edwards v. South Carolina, 372 U.S. 229 (1963).
In what has been described as "unquestionably the greatest victory won by the defendants in the modern history of torts," however, the *New York Times* Court brought defamatory speech within the first amendment’s protection and announced constitutional limitations upon the common law right to recover for defamation. In *New York Times*, the Commissioner of Public Affairs of Montgomery, Alabama brought suit against the publishers of *The New York Times* and four civil rights leaders claiming that an "editorial advertisement" sponsored by the individual defendants and published in the defendant newspaper contained false statements of police abuses and official harassment of Dr. Martin Luther King, Jr. by Montgomery police. The plaintiff contended that, as a result of his position, these allegations reflected upon his personal reputation, and an Alabama jury awarded him $500,000 in damages. On appeal from the decision of the Alabama Supreme Court which had affirmed the jury's decision, the United States Supreme Court rejected the plaintiff's arguments that the first and fourteenth amendments were inapplicable and reversed the lower court's decision, holding that those constitutional protections "prohibit a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard whether it was false or not." While Justices Black, (fighting words); Roth v. United States, 354 U.S. 476 (1957) (obscenity); Beauharnais v. Illinois, 343 U.S. 250 (1952) (criminal libel).

34. W. Prosser, supra note 4, at 819.
35. 376 U.S. at 279.
36. Id. at 256-59.
37. Id. at 256.
38. Id. at 289 n.28.
39. Id. at 265-68. The plaintiff made three arguments to avoid the application of the fourteenth, and, derivatively, the first, amendments to the facts of the case: First, the plaintiff contended that no "state action" was involved because the case involved a suit between private parties. *Id.* at 265. The Court rejected this argument, reasoning that state action could be found in the state rules of tort law which restricted the constitutional freedoms of speech and the press. *Id.* Second, the plaintiff contended that the first amendment was inapplicable to commercial speech such as the paid advertisement printed by the newspaper. *Id.* The Court rejected this claim on the basis of its belief that this type of "editorial advertisement" was an important outlet for political speech and could not be relegated to an inferior position under the first amendment. *Id.* at 265-66. Third, the plaintiff contended that defamatory speech was not protected by the first amendment. *Id.* at 268. For the Court's resolution of this issue, see notes 40-48 and accompanying text infra.

40. 376 U.S. at 279-80. In addition to finding a constitutional requirement of a showing of actual malice in cases involving public figures, the Court rested its result on an alternative ground as well. *Id.* at 288-92. The Court held that the evidence was insufficient to support the finding that the defamatory statements were made "of and concerning the plaintiff." *Id.* at 288. This ruling was based on the Court's belief that Alabama could not constitutionally allow general criticism of the government to be transformed into a personal attack on an individual by "legal alchemy." *Id.* at 292.
Goldberg, and Douglas espoused an “absolutist” view of the first amendment under which speech cannot be limited as a result of its content, thus granting the defendants an “unconditional privilege to criticize official conduct,” Justice Brennan’s majority opinion adopted a balancing approach under which free speech can be subordinated to an interest of sufficient magnitude. In finding an individual public official’s interest in his reputation to be generally insufficient to warrant intrusion into protected speech, Justice Brennan noted that an “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ they ‘need . . . to survive.’” The exception to this general rule, the Court held, was where the plaintiff could prove with “convincing clarity” that the statements were made with “actual malice.”

41. Id. at 293 (Black, J., concurring); id. at 298 (Goldberg, J., concurring). See Berney, supra note 26, at 37.

42. 376 U.S. at 298 (Goldberg, J., concurring).

43. Id. at 271-74. See Berney, supra note 26, at 38-39.

44. 376 U.S. at 271-73.

45. Id. at 285-86. The “convincing clarity” test of New York Times has been equated with the more familiar standard of “clear and convincing” proof. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). Whether denominated “convincing clarity” or “clear and convincing,” this standard is generally described as falling between the normal civil standard of “mere preponderance of the evidence” and the criminal standard of “beyond a reasonable doubt” in terms of required degree of proof the plaintiff must meet. R. Sack, supra note 4, at 225. Such proof must be “strong, positive and free from doubt . . . full, clear and decisive . . . .” Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 871, 330 N.E.2d 161, 175 (1975) (citations omitted). The convincing clarity test has been described as well suited for state of mind determinations such as actual malice because it persuades a jury to decide the issue on the evidence rather than their own predilections. R. Sack, supra, at 225.

46. 376 U.S. at 279-80. “Actual malice” was the term the Court used to identify its constitutional standard of knowledge of falsity or reckless disregard of falsity. Id. The “actual malice” referred to in New York Times is unrelated to common law malice or ill will, and has become a term of art in defamation practice. Herbert v. Lando, 441 U.S. 153, 199 (1979) (Stewart, J., dissenting). See R. Sack, supra note 4, at 211-12. The key ingredient to “actual malice,” — recklessness — was defined in St. Amant v. Thompson, 390 U.S. 727 (1968):

[Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.]

Id. at 731.

actual malice standard, which had its origins in the common law concept of "fair comment." It is designed to permit reasonably held opinions on matters of public concern to be voiced freely without fear of liability while protecting the interests of public officials defamed by intentionally or recklessly false statements which are assumed to be inherently of no useful societal purpose.

The actual malice standard enunciated by the *New York Times* Court was there applied to a libel action brought by a public official against critics of his official conduct. Three years later, the standard was extended to preclude recovery, absent a showing of actual malice, by "public figures" — those of general fame and those who seek to influence public opinion. In *Curtis Publishing Co. v. Butts*, the plaintiff, a college football coach accused in a *Saturday Evening Post* article of conspiring to "fix" a game, was held to be a public figure but was found to have met the actual malice standard by showing that the allegation that he had "fixed" the game was based solely on the affidavit of one man of questionable veracity. In *Associated Press v. Walker*, decided together with *Butts*, the plaintiff, a retired army officer, based his defamation suit on published reports that he had led a campus revolt against federal marshalls who were enforcing a desegregation order at the University of Mississippi. In reversing a jury verdict for the plaintiff, the Court held that due to the fact that there was little time to prepare the offending story, it could not be said that the defendants acted with actual malice when they relied on a contributor's first-hand account. The Court's decision in both cases was based upon its conclusion that because the "views and actions as an opinion). The manner in which the defendant researched the statement, or the editorial process, may be explored. See *Herbert v. Lando*, 441 U.S. at 176; *Arnheiter v. Random House, Inc.*, 578 F.2d 804, 806 (9th Cir. 1978). Often the defendant's own testimony is critical. See, e.g., *Guam Fed'n of Teachers, Local 1581 v. Israel*, 492 F.2d 438, 439 (9th Cir.), cert. denied, 419 U.S. 872 (1974). See also *L. Eldredge*, supra note 4, at 270-71. See generally *R. Sack*, supra, at 214-23.


49. 376 U.S. at 279-80.

50. 388 U.S. 130 (1967).

51. *Id.* at 135-37.

52. *Id.* at 157. Justices Black and Douglas dissented on the grounds that the first amendment prohibits all libel actions against the press. *Id.* at 170-72 (Black, J., dissenting). See notes 41-42 and accompanying text supra.


54. *Id.*

55. *Id.* at 140. The plaintiff contended that his participation was limited to the advocacy of peaceful protest. *Id.* at 140-41.

56. *Id.* at 141. A plurality of the Court would have lightened a public figure's burden by requiring only a showing of "highly unreasonable conduct" on the part of the defendants. *Id.* at 155.
public figures with respect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of 'public officials',”

events of public concern are of the same constitutional weight and public figures involved in such events should also be subject to the actual malice standard.

While the Court initially went so far as to extend the actual malice standard to all matters of “public or general concern,” in Gertz v. Robert Welch, Inc. the Court held that with respect to plaintiffs who are neither public officials nor public figures, the actual

57. Id. at 162 (Warren, C.J., concurring).
59. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971) (plurality opinion), overruled, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Rosenbloom concerned a magazine distributor who was arrested for selling materials which allegedly violated local obscenity laws. 403 U.S. at 32-33. When news reports of the arrest characterized the distributor as a peddler of smut and filth, the plaintiff brought an action for libel and prevailed. Id. at 33-35, 40. In the Supreme Court, the lower court decision was reversed, with a plurality — Justices Brennan and Blackmun, and Chief Justice Burger — holding that the first amendment required that the New York Times actual malice standard be applied to all defamation actions concerning the plaintiff's involvement in events of “public or general concern.” Id. at 52. Justice Black concurred, maintaining the absolutist view that the first amendment required an absolute privilege to publish defamation. Id. at 57 (Black, J., concurring). Justice White, while concurring, would have limited the holding of the plurality to events involving the official acts of public servants. Id. at 62 (White, J., concurring). See Cohen, A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?, 18 U.C.L.A. L. REV. 371 (1971).
61. The Walker and Butts cases defined the term “public figure” only vaguely. Note, supra note 58, at 162. In Gertz, however, the Court more precisely defined “public figures” as those who

have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

418 U.S. at 345.

Thus, there are two classes of public figures: the “all-purpose” public figure who uniformly must meet the actual malice standard; and the “limited purpose” public figure, who must meet the standard only with respect to those defama-
malice standard did not adequately reflect the increased state interest in protecting an individual's reputation. Applying the balancing approach enunciated in New York Times, however, the Court held that, while not requiring application of the actual malice standard in cases involving private individuals, the first amendment did prohibit the states from imposing liability on a defendant without fault from basing recovery upon presumed damages, or from awarding punitive damages in the absence of actual malice. The Court's rationale in reinforcing the "public figure/private figure" distinction was two-fold: First, public officials and public figures have a greater opportunity to vindicate their reputations by utilizing their ready access to the media; and, second, public figures and public officials have accepted the risk of closer public scrutiny by their actions in seeking notoriety.

In Gertz, the Court refused to characterize the plaintiff, a local attorney who had long been active in community and professional affairs and who was currently engaged in litigation of some public interest, as a public figure, reasoning that "[i]t is preferable to reduce the held not a public figure); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (researcher with government grant not a public figure); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (society figure not a public figure).

62. 418 U.S. at 346.
63. See notes 43-46 and accompanying text supra.
64. 418 U.S. at 351. Essentially, a private individual is anyone who cannot be classed as a public figure or a public official. In Gertz, the plaintiff was a lawyer who had been active in community affairs. Id. However, the Court held that this plaintiff was a private individual for defamation purposes because "he did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." Id. at 352. See notes 71-73 and accompanying text infra.
65. The majority opinion in Gertz spoke in terms of defendants who are "publishers or broadcasters." 418 U.S. at 347. This has resulted in controversy as to whether Gertz applies to defamation cases involving non-media, as well as media, defendants. See R. Sack, supra note 4, at 261-65; Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1416-18 (1975); Robertson, Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc., 54 Tex. L. Rev. 199, 215-20.
66. 418 U.S. at 347.
67. Id. at 349-50. The Court required proof of "actual harm inflicted by defamatory falsehood includ[ing] impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." Id. at 350.
68. See Eaton, supra note 41, at 1432-38; Robertson, supra note 65, at 230-34.
69. 418 U.S. at 344.
70. Id. at 344-45.
71. Id. at 351-52.
public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." 72 In the case before it, the Court concluded, the plaintiff "plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." 73

III. DISCUSSION: PRACTICING UNDER THE ACTUAL MALICE STANDARD

A. The Role of Summary Judgment in Actual Malice Cases

Generally, in considering a motion for summary judgment, a court examines the record 74 in the light most favorable to the non-moving

72. Id. at 352.

73. Id. Generally speaking, the lower courts have given the term public figure a broad meaning and have applied it liberally in dealing with plaintiffs who have voluntarily entered the realm of public interest. R. Sack, supra note 4, at 198. However, with respect to so-called "limited purpose" public figures, the Supreme Court has suggested a narrower interpretation. See id. at 199-200. In Wolston v. Reader's Digest Ass'n, Inc., the plaintiff, who in 1958 had been convicted of criminal contempt for failure to appear before a grand jury investigating espionage, was classified as a Soviet agent in a book published by the defendant. 443 U.S. 157, 159 (1979). The trial court ruled that the plaintiff was a public figure and granted defendant's motion for summary judgment. Id. at 160.

On review by the Supreme Court, the judgment was reversed on the rationale that the plaintiff was not a public figure. Id. at 166. The Court thought that the plaintiff had not voluntarily thrust himself into the forefront of any controversy, and that, therefore, under Gertz, he was not a public figure. Id. at 166-67. According to the Wolston Court, "the mere fact that [the plaintiff] voluntarily chose not to appear before the grand jury, knowing that his action might be attended by publicity, is not decisive on the question of public figure status." Id. at 167. The Court further rejected the defendant's contention that any person who engages in criminal conduct becomes a public figure as to the circumstances surrounding his conviction. Id. at 168.

74. In the context of a summary judgment motion, the record before the court will consist of pleadings, depositions, answers to interrogatories, admissions, and affidavits. See, e.g., Fed. R. Civ. P. 56; Pa. R. Civ. P. 1035. Modern discovery rules allow a party to obtain from any person, even an adverse party, any non-privileged data relevant to the case. 6 J. Moore, Federal Practice ¶ 56.15[5], at 56-557 (2d ed. 1976). Under existing cases, the defamation plaintiff can obtain evidence regarding the editorial process and can present it at the time the defendant makes the motion for summary judgment on the issue of actual malice. See Herbert v. Lando, 441 U.S. 153 (1979).

Herbert involved a retired army officer, Anthony Herbert, who, during the Vietnam war, had reported to the media the war crimes of his superiors. Id. at 155-56. The CBS television network broadcast a report which alleged that Herbert had fabricated these charges. Id. at 156. Herbert sued for libel and attempted to depose the producers of the allegedly defamatory program as to the editorial process that had been followed. Id. at 156-57. The producers refused to answer questions on this point on first amendment grounds, but the trial court rejected this claim as a defense. Id. at 157-58. The United States Court of Appeals for the Second Circuit reversed. Id. at 158. On review by the Supreme Court, the trial judge was affirmed. Id. The Court decided that it would be unfair to require a plaintiff to prove actual malice and then take away from him the tools necessary to do so. Id. at 160. Although the
party, and if no genuine issue of material fact is found, the moving party is entitled to judgment without having to resort to trial. This summary remedy thus relieves the litigants of the expense of a costly trial, and at the same time reduces the likelihood that a plaintiff can use a frivolous claim to coerce settlement by threatening to proceed to trial.

Despite a general reluctance to grant summary judgment on issues which, like actual malice, involve a subjective state-of-mind determination, the granting of summary judgments in favor of defamation defendants has been described as the rule rather than the exception.

Court recognized that it would be unusual if proof of actual malice came from the defendant's own mouth, it believed that the direct inquiry into the defendant's state of mind was clearly relevant and could not be denied to the plaintiff. Id. at 170.

75. See 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2727, at 524-28 (1973). The court will construe the evidence in favor of the party opposing the motion and will give him the benefit of all favorable inferences which can be drawn. Id.; FED. R. CIV. P. 56.

76. 10 C. WRIGHT & A. MILLER, supra note 75, § 2711, at 364. See generally Sheehan, Summary Judgment: Let the Movant Beware, 8 ST. MARY'S L.J. 253 (1976). The moving party has the burden of showing that he is entitled to judgment based on the facts presented and the law applicable to the particular cause of action. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Sheridan v. Garrison, 412 F.2d 644 (5th Cir. 1969). In a defendant's motion for summary judgment on the issue of actual malice in a defamation action, then, the defendant must show that the facts cannot support a finding of actual malice with convincing clarity. See, e.g., Southard v. Forbes, Inc., 588 F.2d 140 (5th Cir. 1979); Nader v. de Toledano, 408 A.2d 31 (D.C. 1979), cert. denied, 444 U.S. 1078 (1980). The non-movant, however, must make an affirmative showing that the motion should be denied due to the existence of a material issue of fact. FED. R. CIV. P. 56(e).


79. 10 C. WRIGHT & A. MILLER, supra note 75, § 2730, at 583-600. See Croley v. Matson Navigation Co., 434 F.2d 73 (5th Cir. 1971). It has been noted that:

The Court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of state of mind. Much depends on the credibility of the witnesses testifying as to their own states of mind. In these circumstances the jury should be given an opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue.

Id. at 77.

Moreover, to the extent that a determination of someone's subjective state of mind involves the drawing of inferences as to which reasonable minds may differ, summary judgment may be inappropriate due to the fact that the drawing of inferences is traditionally the function of the jury. 10 C. WRIGHT & A. MILLER, supra, § 2730, at 583-84.

80. See note 15 and accompanying text supra. One court described the granting of summary judgments in favor of defamation defendants to be "rooted
Two explanations for the development of such a rule have been offered. The first explanation is based on the plaintiff's burden of showing with "convincing clarity" that the defendant made the defamatory statement with actual malice. Since this standard is more rigorous than the preponderance of the evidence burden of proof applicable in civil cases, it will be easier for the defendant to demonstrate the appropriateness of summary judgment. Secondly, several courts and commentators have discussed the special need for summary procedures in defamation cases. Perhaps the leading case articulating this need is Washington Post v. Keogh. In Keogh, the United States Court of Appeals for the District of Columbia Circuit reversed a district court's denial of a newspaper's motion for summary judgment, stating:


The mandate for the court to apply the actual malice test to the evidence adduced for summary judgment is found in New York Times where the Court stated that "we must examine for ourselves the statements in issue and the circumstances under which they were made to see [whether] the proof presented to show actual malice has the convincing clarity which the constitutional standard demands." 376 U.S. at 285-86. See Time, Inc. v. McLaney, 406 F.2d at 572; Buchanan v. Associated Press, 398 F. Supp. at 1205.


85. 365 F.2d at 966-67.
In the First Amendment area, summary procedures are essential. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as the fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. Unless persons, including newspapers, are assured freedom from the harassment of lawsuits, they will tend to become self-censors.

86. Id. at 968. The Keogh court assumed that non-media defendants have the benefit of the “actual malice” standard. Id.

The combination of this special need for summary disposition with the heightened standard of proof required for actual malice resulted in the liberal and frequent granting of summary judgments to defamation defendants.

B. Various Articulations of the Standards for Granting Summary Judgment

Given the widespread practice of granting summary judgment in actual malice defamation cases, three articulations of the courts' role in ruling on such motions have developed. 87

One articulation is found in Judge Skelly Wright's concurring opinion in Wasserman v. Time, Inc. 88 There, Judge Wright discussed the procedure a trial court should follow in ruling on summary judgment and directed verdict motions involving the issue of actual malice. 89 According to Judge Wright, special judicial involvement in the consideration of these motions is warranted by the first amendment. 90 In reviewing the evidence, the trial judge is to personally draw reasonable


88. 424 F.2d 920, 922-23 (D.C. Cir.) (Wright, J., concurring), cert. denied, 398 U.S. 940 (1970). In Wasserman, the Court of Appeals reversed a summary judgment in favor of the defendant, basing its decision on the fact that undisputed evidence existed that the defendant knew that the plaintiff was an attorney for, and not a member of, a group slated to appear before a grand jury investigating organized crime, but placed plaintiff in the same category in an article. 424 F.2d at 921-22. Judge Wright agreed with the decision of the majority, but concurred in order to set forth what he considered to be the proper procedure for a trial court to follow in actual malice cases. Id. at 922 (Wright, J., concurring). See note 89 infra.

89. 424 F.2d at 922-23 (Wright, J., concurring). Judge Wright stated:

In my judgment New York Times v. Sullivan makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the Times test of actual knowledge or reckless disregard of the truth. Unless the court finds, on the basis of pre-trial affidavits, deposition or other documentary evidence, that the plaintiff can prove actual malice in the Times sense, it should grant summary judgment for the defendant.

If the case survives the defendant's summary judgment motion, the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with "convincing clarity." In making this judgment the court will judge the credibility of the witnesses and draw its own inferences from the evidence . . . . If the motion for directed verdict . . . . is denied, the actual malice issue . . . . is then submitted to the jury under the Times instruction . . . .

This two-step procedure in which both the trial judge and the jury must find actual malice before there can be judgment for the plaintiff provides the protection of the First Amendment freedom that Times sought to make secure . . . .

Id. (footnotes and citations omitted).

90. Id. See Comment, supra note 81, at 1804.
inferences and weight credibility in making a decision as to whether actual malice could be found with convincing clarity.


In *Guam*, a teachers' union brought a libel action against a school board member who had made uncomplimentary remarks about the union in a local newspaper. 492 F.2d at 438. In reviewing the grant of a directed verdict in favor of the defendant, the court reversed, concluding that the plaintiff's evidence, when viewed in the light most favorable to the plaintiff, would permit a reasonable jury to find actual malice with convincing clarity. *Id.* The trial judge had expressly indicated that he was drawing inferences and weighing credibility in reliance on Judge Wright's opinion in *Wasserman*. *Id.* at 439-40. For a discussion of *Wasserman*, see notes 88-92 and accompanying text supra.

Although the case before it involved a motion for a directed verdict, the *Guam* rationale extended to summary judgments as well. *Id.* at 441. The court stated:

We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, [or] a motion for directed verdict . . . is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not . . . the duty of the judge, or this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party . . . .

*Id.* In rejecting Wright's approach, the *Guam* court noted that the suggestion that a judge should determine the credibility of the evidence was dicta, and that subsequent cases had not followed the suggestion. *Id.* The *Guam* court, nonetheless, agreed with *Wasserman* that "special care is appropriate" at the
with normal summary judgment procedures under which the trial court is to review the evidence to determine whether the plaintiff has presented facts which create a jury question on the issue of actual malice. The Guam court did recognize the burden on the plaintiff to demonstrate with convincing clarity that the statement was made with actual malice; a plaintiff unable to make such a showing will be vulnerable to a summary judgment motion.

A third type of summary judgment practice has been tentatively identified as existing in the state courts of Colorado, Washington, summary judgment level in order to avoid a chilling on first amendment rights. This case, however, was limited to closely scrutinizing the evidence to determine whether summary judgment should be granted. The court stated:

The standard against which the evidence must be examined is that of New York Times and its progeny. But the manner in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury.


The Guam court would have a trial court examine the evidence in the light most favorable to the plaintiff to see whether actual malice could be shown with convincing clarity. See id.

See Nader v. de Toledano, 408 A.2d 31 (D.C. App. 1979), cert. denied, 444 U.S. 1078 (1980). The court considered this third view to be distinct from the other two, but labelled it the “functional equivalent” of the Guam standard. Id. at 47-48.

DiLeo v. Koltonow, — Colo. —, 613 P.2d 318 (1980). DiLeo involved an appeal from a grant of summary judgment in favor of the defendant. Id. at —, 613 P.2d at 320. The plaintiff, a police officer who had been fired and was seeking re-instatement, considered a newspaper account of his official conduct to be defamatory. Id. The DiLeo court, after concluding that the plaintiff was a public figure for the purpose of controversy over his rehiring, next considered whether the trial court properly granted summary judgment. Id. at —, 613 P.2d at 321-28. The court ruled that the convincing clarity test applied at the summary judgment stage. Id. at —, 613 P.2d at 325. On the merits, the court noted that the defendants, according to the record adduced for summary judgment, had published in reliance on competent sources and after a corroborating investigation. Id. at —, 613 P.2d at 324. The plaintiff, on the other hand, had produced no evidence of actual malice. Id. Thus, the DiLeo court upheld the grant of summary judgment to the defendant. Id.

Chase v. Daily Record, Inc., 83 Wash. 2d 37, 515 P.2d 154 (1973). In Chase, the plaintiff was a port commissioner who had allegedly received public funds for a business trip he had not taken. Id. at 38, 515 P.2d at 155. When the plaintiff learned that a local newspaper planned to publish this
story, he called the paper to make a statement. *Id.* The paper printed the
story and part of the plaintiff's statement, leaving out his assertion that he had
not received any public money. *Id.* Chase sued the newspaper for libel and
the newspaper was granted summary judgment. *Id.* at 40, 515 P.2d at 156.
After finding the plaintiff to be a public official under *New York Times*
the *Chase* court turned to a consideration of proper summary judgment procedure
in defamation actions involving actual malice. *Id.* at 42-43, 515 P.2d at 156-57.
The court stated:

> [I]n such defamation actions, if the trial judge at the summary judg-
ment stage determines that the plaintiff has offered evidence of a
sufficient quantum to establish a prima facie case, and the offered evi-
dence can be equated with the standard or test of "convincing clarity"
prescribed by United States Supreme Court decisions, the motion for
summary judgment should be denied.

*Id.* at 43, 515 P.2d at 157-58 (footnote omitted) (emphasis in original). On the
facts, the court found that the defendant knowingly made a false statement
about the plaintiff and reversed the grant of summary judgment. *Id.* at 45,
515 P.2d at 158.

*Adams*, a defamation action was brought against a radio station which failed
to use a tape delay system in connection with a talk show during the course of
which the plaintiff, a local politician, was defamed. *Id.* at 558. The trial court
granted summary judgment for the defendant. *Id.* The *Adams* court found
that the facts of the case were undisputed and that, as a matter of law, the
failure to use a tape delay did not constitute actual malice. *Id.* at 562-67.
Therefore, the trial court was affirmed. *Id.* at 567. The *Adams* court quoted
with approval the prima facie case test of *Chase v. Daily Record, Inc.*, 83 Wash.

103. 83 Wash. 2d 37, 515 P.2d 154 (1973).

104. *Id.* For a discussion of *Chase*, see note 101 supra. While the *Chase*
court did not define a prima facie case, another court, in explaining *Chase*,
defined a prima facie case as one which, if uncontradicted, would allow a plain-

105. 88 Wash. 2d at 44-45, 515 P.2d at 157-58. *See* note 101 *supra*.

106. Nader v. de Toledano, 408 A.2d 32, 49 (D.C. App. 1979), cert. denied,
444 U.S. 1078 (1980). In equating the two, the *Nader* court reasoned that
*Chase's* prima facie case test — that quantity of proof which, if believed, would
permit judgment in one party's favor unless contradicted by evidence offered
by the opposing party — is the same as the normal summary judgment pro-
cedure which was followed in *Guam*. 408 A.2d at 49. The *Guam* test focuses
on how the evidence is to be viewed, while the *Chase* test focuses on the weight
the evidence must attain after it is viewed. In that the *Chase* court indicated
that the summary judgment procedure is basically the same, it too would view
the evidence in the light most favorable to the nonmovant. *See* note 101 *supra*.

107. Compare Guam Fed'n of Teachers, Local 1581 v. Ysrael, 492 F.2d at
441 (whether the evidence, when viewed in the light most favorable to the
C. Hutchinson v. Proxmire: The Supreme Court Disapproves of the Liberal Granting of Summary Judgment

In Hutchinson v. Proxmire, the United States Supreme Court reviewed the grant of summary judgment in favor of Senator William Proxmire, who, in the course of announcing his "Golden Fleece" award, had allegedly defamed a federally funded research scientist. The defamatory statement was made during a speech in Congress and was subsequently released in full to the press. The trial court, considering the statements to be privileged under a combination of the Speech or Debate clause, the New York Times standard, and the state law right of fair comment, granted the defendant summary judgment. The Seventh Circuit affirmed on the constitutional grounds.

nonmovant, established actual malice with convincing clarity) with Chase v. Daily Record, Inc., 83 Wash. 2d at 43, 515 P.2d at 157 (whether the evidence is of sufficient quantum to establish a prima facie case and can be equated with the test of convincing clarity).

108. 443 U.S. 111 (1979). Chief Justice Burger wrote the majority opinion in which all but Justice Brennan joined. Id. at 113.

109. Id. at 114-17. Senator Proxmire created the "award" to publicize outrageous examples of wasteful government spending. Id. at 114. The plaintiff, Ronald Hutchinson, had conducted studies of the emotional behavior in certain animals when subjected to stress. Id. at 115. Both the Navy and the National Aeronautics and Space Administration funded this research in order to ascertain problems associated with confining humans in close quarters for long periods of time. Id. Proxmire, in part, charged that Hutchinson had "made a fortune from his . . . [studies] and in the process made a monkey out of the American taxpayer." Id. at 116.

110. Id. at 115-16. In addition to the Senate speech, Senator Proxmire sent out press releases to the media and sent copies to about 100,000 people in a newsletter. Id. at 115-17. He also repeated the statements on a television interview. Id.

111. 431 F. Supp. 1311 (W.D. Wis. 1977), remanded, 579 F.2d 1027 (7th Cir. 1978), rev'd, 443 U.S. 111 (1979). The Speech or Debate clause provides: "[for any Speech or Debate in either House, [the Senators or Representatives] shall not be questioned in any other place." U.S. Const. art. I, § 6, cl. 1. The trial court considered all actions within the legislative role to be protected by this clause. 431 F. Supp. at 1320-21. On this basis, the court held that both the speech itself and the press releases were protected. Id. at 1325.

112. 431 F. Supp. at 1311. The court held that the plaintiff was both a public figure and a public official due to his position as a government researcher. Id. at 1325-28.

113. Id. at 1330-32. For a discussion of fair comment, see note 47 and accompanying text supra.

114. 431 F. Supp. at 1333. The trial court followed the normal summary judgment procedure espoused by Guam. Id. at 1330. However, the court, in determining whether a showing of actual malice had been made, stated that "in making this determination, the granting of summary judgment may well be the 'rule' rather than the 'exception.'" Id.

115. 579 F.2d 1027 (7th Cir. 1978), rev'd, 443 U.S. 111 (1979). The Court of Appeals held that the speech, the press releases, and the newsletters were protected by the Speech or Debate clause. 579 F.2d at 1031-54.
The Supreme Court reversed and remanded, holding that some of the statements were not immune under the Speech or Debate clause and that, since the plaintiff was not a public figure, the actual malice standard did not apply to the remainder of the statements.

Discussing the trial court's observation that summary judgment might be the rule rather than the exception in actual malice defamation cases, the *Hutchinson* Court, in footnote nine, rebuked the trial court by questioning the propriety of summary judgments in cases involving issues of state of mind. However, the Court noted that the question was not presented by the facts of the case, and did not pursue the issue.

**D. Summary Judgments after Hutchinson**

While footnote nine was not necessary to the Court's holding, the Court's view of the lower courts' propensity to grant summary judgments was clear. However, since the footnote dealt with the subject

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116. 443 U.S. at 114. Since the Court of Appeals had not considered the state law ground of the privilege of fair comment, the cause was remanded. See 579 F.2d at 1029.

117. 443 U.S. at 129-33. The Court ruled that while the speech itself would be absolutely immune, neither the press releases nor the newsletters were essential to the functioning of the Senate. The latter material, therefore, was not protected. *Id.* at 130-33. Justice Brennan, dissenting, would have held the newsletters and press releases immune. *Id.* at 136 (Brennan, J., dissenting).

118. *Id.* at 138-36. The Court relied on *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979), in determining that the plaintiff was not a public figure. 443 U.S. at 135. For a discussion of *Wolston*, see note 73 supra. The Court reasoned that Hutchinson had not thrust himself into the forefront of any public controversy since his publications were known to only a small group of scientists. Furthermore, the Court reasoned that he had come into the public eye only through Proxmire's own misconduct in publicizing the award. 443 U.S. at 135-36.

119. 443 U.S. at 120 & n.9. For the text of footnote nine, see text accompanying note 21 supra.

120. 443 U.S. at 120 & n.9. The Court phrased the issue as one concerning the appropriateness of summary judgment, arising from the trial court's view that "solicitude for the First Amendment required a more hospitable judicial attitude toward granting summary judgment in a libel case." *Id.* at 122.


122. See, e.g., Yiamouyiannis v. Consumers Union of United States, Inc., 619 F.2d 932, 939 (2d Cir.), cert. denied, 101 S. Ct. 117 (1980) ("The Chief Justice's opinion in *Hutchinson* not only states 'doubt' about the supposed 'rule' [supporting summary judgment], but takes almost the opposite position").
only briefly, and explicitly refrained from addressing the merits, later courts were given no guidance as to what, specifically, was being disapproved. Nonetheless, courts considering post-*Hutchinson* defamation actions have been quick to adopt the footnote as authority.

The District of Columbia Court of Appeals in *Nader v. de Tole-dano*, viewed the *Hutchinson* footnote as casting doubt upon Judge Wright's suggestion that the trial judge make a personal appraisal of the evidence. After setting forth what it considered to be the three pre-*Hutchinson* articulations of when summary judgment should be granted, the *Nader* court opined that footnote nine required that normal procedures be applied to summary judgment proceedings. Reasoning that Judge Wright's standard improperly allowed a judge to assess the credibility of witnesses and, thereby, to usurp the role

123. 443 U.S. at 120 n.9. The Court stated that "[i]n the present posture of the case, however, the propriety of dealing with such complex issues by summary judgment is not before us." *Id.*


In denying a summary judgment motion, the *Siegelman* court stated:

> The plaintiffs have alleged that the defamatory remarks were made with actual malice and that therefore the *New York Times* standard has been met. While the supporting material submitted as to this point is *far from convincing*, the plaintiffs have managed to place the defendant's state of mind into question, and, in view of the Supreme Court's statement in *Proxmire*, the Court does not believe it appropriate to grant summary judgment at this time.

*Id.* at 955 (emphasis added).

125. 408 A.2d 31 (D.C. App. 1979), cert. denied, 444 U.S. 1078 (1980). Consumer advocate Ralph Nader brought a libel action against a newspaper and its columnist who wrote an article asserting that Nader had "falsified and distorted" evidence presented to a Senate committee investigating the safety of General Motors' Corvair automobile. *Id.* at 35-38. Summary judgment was granted to the defendants on the grounds that Nader could not prove actual malice with convincing clarity. *Id.* at 38.

126. 408 A.2d at 49. The *Nader* court stated: "We are unpersuaded by Judge Wright's . . . approach . . . [t] impermissively denigrates the traditional roles of judge and jury. Furthermore, we glean from the *New York Times* and *[Hutchinson]* decisions . . . that the Court envisions normal function of the jury in libel actions . . . ." *Id.* (citations omitted). For a further discussion of Judge Wright's approach, see notes 88-92 and accompanying text supra.

127. 408 A.2d at 45-49. The *Nader* court identified the *Wasserman*, *Guam*, and *Chase* articulations. *Id.* For a further discussion of these articulations, see notes 88-107 and accompanying text supra.

128. 408 A.2d at 49.
of the jury, the *Nader* court held that the proper test was that stated in *Guam*: "[T]he plaintiff need only present evidence which shows a genuine issue of material fact from which a reasonable jury could find actual malice with convincing clarity." In the case before it, believing the trial judge to have determined the credibility of the evidence in reliance on Judge Wright's standard, the *Nader* court reversed the grant of summary judgment to the defendant.

Similarly, the *Nader* dissent viewed Judge Wright's standard as one which had been thoroughly discredited by other courts and

129. *Id.* The *Nader* court viewed Judge Wright's approach as a departure from normal summary judgment procedures in two ways: 1) the evidence is viewed by the trial judge in its most reasonable light, rather than the light most favorable to the non-movant, and 2) the trial judge personally determines whether actual malice can be proven with convincing clarity, rather than determining whether a reasonable jury could so find. *Id.* at 46.

130. *Id.* at 49. For a discussion of the *Guam* approach, see notes 93-98 and accompanying text *supra*.

131. 408 A.2d at 49 (emphasis in original). While the *Nader* court thought that summary judgment was an important stage of libel litigation, it disagreed with any "skewing of the roles of judge and jury," and therefore applied the normal procedures for summary judgment. *Id.* at 49-50.

132. *Id.* at 44. The trial judge, while viewing the evidence in the light most favorable to the plaintiff, had, in the *Nader* court's view, ruled that the trial judge himself must be satisfied that actual malice had been proven with convincing clarity. *Id.* The *Nader* court agreed with the plaintiff's contention that the trial judge's view impermissibly required the plaintiff to prove actual malice twice, once to the judge and once to the jury. *Id.*

133. *Id.* at 54. The rationale for the reversal was based on the fact that the Senate committee to which Nader reported had characterized his charges as made in good faith, albeit unfounded. *Id.* at 50-53. According to the court, the columnist, in writing that Nader had falsified his evidence, deliberately overlooked this good faith finding. *Id.* at 53. Under these circumstances, the court believed that a reasonable jury could find actual malice with convincing clarity. *Id.* at 53-54.

The *Nader* court, however, affirmed the summary judgment with respect to the defendant newspaper, reasoning that in relying on the expertise of the columnist without undertaking a corroborative investigation, the newspaper could be found to have been only negligent. *Id.* at 54-58. Therefore, no reasonable jury could find actual malice with convincing clarity. *Id.* at 58.

134. *Id.* at 60 (Harris, J., concurring in part and dissenting in part). Judge Harris read Judge Wright's opinion in *Wasserman* as suggesting two things: 1) that the convincing clarity burden of proof be applied at the summary judgment stage, and 2) that in ruling on a motion for a directed verdict, the trial judge should make a personal appraisal of the weight of the evidence. *Id.* Thus, in Judge Harris' view, Judge Wright had correctly espoused the approach to be taken as to summary judgment and had only issued harmless dicta as to the approach on a directed verdict motion. *Id.* See *Brophy* v. Philadelphia Newspapers, Inc., — Pa. Super. Ct. —, 422 A.2d 625, 634-42 (1980) (Spaeth, J., concurring). For a discussion of *Brophy*, see notes 153-61 and accompanying text *infra*. Moreover, Judge Harris pointed out, the courts were uniform in applying the convincing clarity standard at the summary judgment stage and in rejecting any suggestion that a trial judge personally appraise evidence in determining motions for summary judgment. 408 A.2d at 60 (Harris, J., concurring in part and dissenting in part). See, e.g., Fadell v. Minneapolis Star & Tribune Co., 557 F.2d 107, 108 (7th Cir.), *cert. denied*, 434 U.S. 996 (1977); Walker v. Cahalan, 542 F.2d 681, 684 (6th Cir. 1976), *cert. denied*. 408 A.2d 60 (Harris, J., concurring in part and dissenting in part).
sidered the Guam standard to be the majority rule.\textsuperscript{135} Accusing the
majority of creating a false conflict in the law in order to justify its
decision,\textsuperscript{136} however, the dissent maintained that the lower court had
properly used the Guam standard.\textsuperscript{137}

Nevertheless, recent decisions have cited \textit{Nader} with approval.\textsuperscript{138}
In \textit{National Association of Government Employees, Inc. v. Central
Broadcasting Corp.},\textsuperscript{139} the Supreme Judicial Court of Massachusetts
reversed a lower court's denial of the defendant's motion for summary
judgment and entered instead a judgment for the defendant.\textsuperscript{140} Al-
denied, 430 U.S. 966 (1977); \textit{Alioto v. Cowles Communications, Inc.}, 519 F.2d
777, 780 (9th Cir.), \textit{cert. denied}, 423 U.S. 930 (1975); \textit{Guam Fed'n of Teachers,
Local 1581 v. Ysrael}, 492 F.2d 438, 441 (9th Cir.), \textit{cert. denied}, 419 U.S. 872
(1974); \textit{Bon Air Hotel, Inc. v. Time, Inc.}, 426 F.2d 858, 864-65 (5th Cir. 1970);
1350 (W.D. Wis. 1977), \textit{afj'd}, 579 F.2d 1027 (7th Cir. 1978), \textit{rev'd on other
1204-05 (D.D.C. 1975); \textit{Kent v. Pittsburgh Press Co.}, 349 F. Supp. 622 (W.D.

135. 408 A.2d at 59-63 (Harris, J., concurring in part and dissenting in
part). Judge Harris believed the proper inquiry to be whether a reasonable
jury could find actual malice with convincing clarity. \textit{Id.} at 60 (Harris, J.,
concurring in part and dissenting in part). Furthermore, while "[s]ome courts
have been more explicit than others in setting forth the appropriate standard,
... by no means can it accurately be said that there are alternative ap-
proaches abroad in the land." \textit{Id.}

136. \textit{Id.} at 60-61 (Harris, J., concurring in part and dissenting in part)
("In my view, the majority creates a nonexistent debate . . . .").

137. \textit{Id.} at 63 (Harris, J., concurring in part and dissenting in part). Judge
Harris would have affirmed both grants of summary judgment. \textit{Id.} at 67
(Harris, J., concurring in part and dissenting in part).

138. See notes 139-61 and accompanying text infra.

The case involved a controversy over the approval of a police collective
bargaining agreement. — Mass. at —, 396 N.E.2d at 998. The police union had
warned the chairman of the local board of selectmen not to speak against the
agreement since it had been approved by a majority of the selectmen. \textit{Id.}
The chairman phoned in to a radio talk show and objected to the union's attempt
to limit his freedom of speech, calling it an "inroad of communism." \textit{Id.} at —,
396 N.E.2d at 999. The talk show host agreed with the chairman, an act
which, according to the union, indicated the radio stations' adoption of the
charge of communism. \textit{Id.} at —, 396 N.E.2d at 999. The union then sued the
station for libel. \textit{Id.} at —, 396 N.E.2d at 997-98. When the station's motion
for summary judgment was denied, the station appealed. \textit{Id.}

140. \textit{Id.} at —, 396 N.E.2d at 998. The court indicated three separate
grounds for reversal. \textit{Id.} at —, 396 N.E.2d at 1000. First, the statement of
the chairman of the selectmen consisted of an accurate factual assertion followed
by an opinion and, as such, was fully protected by the first amendment. \textit{Id.,
quoting} Gertz \textit{v. Robert Welch, Inc.}, 418 U.S. at 339-40 ("Under the First
Amendment there is no such thing as a false idea. However pernicious an
opinion may seem, we depend for its correction . . . on the competition of
other ideas"). Second, the allegation of "communism" was not defamatory in
that a reasonable listener would have understood the allegation as "mere
pejorative rhetoric." — Mass. at —, 396 N.E.2d at 1001-02. Third, the court
held that there was no genuine issue of fact as to actual malice. \textit{Id.} at —, 396
N.E.2d at 1002-03.
though the court acknowledged the *Hutchinson* footnote,\textsuperscript{141} it concluded that footnote nine

does not mean that a party against whom summary judgment is sought is entitled to a trial simply because he has asserted a cause of action to which state of mind is a material element. There must be some indication that he can produce the requisite quantum of evidence to enable him to reach the jury with his claim.\textsuperscript{142}

Recognizing that *Nader* had pointed out that Judge Wright’s procedural measure for summary judgment constituted “less than the customary demanding standard,”\textsuperscript{143} the *Central Broadcasting* court applied the *Nader* standard which requires the plaintiff to present evidence which would enable a jury to find “actual malice” with convincing clarity.\textsuperscript{144} The court noted that, although the plaintiff had had the full use of discovery techniques to adduce proof of recklessness,\textsuperscript{145} the evidence presented was insufficient to allow the requisite finding.\textsuperscript{146}

Similarly, in *Yiamouyiannis v. Consumers Union of United States, Inc.*,\textsuperscript{147} the Second Circuit affirmed a lower court grant of summary judgment for the defendant.\textsuperscript{148} Citing *Nader* for the proposition that normal summary judgment procedures applied,\textsuperscript{149} the *Yiamouyiannis* court concluded that the summary judgment was proper because “no

\textsuperscript{141.} — Mass. at —, 396 N.E.2d at 1003.
\textsuperscript{142.} Id.
\textsuperscript{143.} Id. at — n.13, 396 N.E.2d at 1003 n.13.
\textsuperscript{144.} Id. at —, 396 N.E.2d at 1002-03. According to *Central Broadcasting*, in order for the defendant to succeed on a motion for summary judgment he must establish that “in the evidence brought forward, considered with an indulgence in the plaintiff’s favor, a jury could not reasonably conclude that the plaintiff had shouldered and carried the burden” of proving actual malice with convincing clarity. — *Id.* at —, 396 N.E.2d at 1003.
\textsuperscript{145.} Id. at —, 396 N.E.2d at 1004. The court noted that “the plaintiff, having available to it the instruments of pretrial discovery to seek out proof of the crucial state of mind . . . made no effort . . . to depose [defendant’s agent] or others who might have information.” *Id.,* citing *Herbert v. Lando*, 441 U.S. 153 (1979). For a discussion of *Herbert*, see note 74 supra.
\textsuperscript{146.} — Mass. at —, 396 N.E.2d at 1003-04. In so doing, the court found the plaintiff’s evidence to be insufficient in that it relied merely on an allegation of hostility and also that it lacked the usual basis for inferring a guilty state of mind, i.e., that the statement was fabricated, based on unsubstantiated rumor, or inherently improbable. *Id.*
\textsuperscript{147.} 619 F.2d 932 (2d Cir.), cert. denied, 101 S. Ct. 117 (1980). The plaintiff alleged that his professional reputation as a research scientist was injured by a *Consumer Reports* article which claimed that “the overwhelming weight of scientific evidence” was contrary to the plaintiff’s findings on the danger of fluoridating water supplies. 619 F.2d at 933-35.
\textsuperscript{148.} 619 F.2d at 942.
\textsuperscript{149.} *Id.* at 940. The court reaffirmed that “[d]efamation actions are, for procedural purposes, such as discovery, or for summary judgment, to be treated no differently from other actions; any ‘chilling effect’ caused by the defense of the lawsuit itself, is simply to be disregarded . . . .” *Id.* (citations omitted).
reasonable jury could find with convincing clarity" that the defendant had "acted with actual malice."150 As in Central Broadcasting,151 the Yiamouyiannis court considered the availability of discovery to eliminate the state of mind problem noted in footnote nine.152

The Pennsylvania Superior Court, in Brophy v. Philadelphia Newspapers, Inc.,153 considered the effect of footnote nine144 in affirming a summary judgment in favor of the defendant.155 The lead opinion156 in Brophy rejected the defendant's argument that Pennsylvania courts had adopted Judge Wright's approach,157 and chose to follow the approach of both Guam and Nader.158

150. Id.
151. See notes 139-46 and accompanying text supra.
152. 619 F.2d at 940.
153. — Pa. Super. Ct. at —, 422 A.2d 625 (1980). Brophy involved the shooting of a youth by local police while the former was attempting an armed robbery. Id. at —, 422 A.2d at 627-28. Because the youth was the son of the local Chief of Police and the chief had had a running feud with the Police Commissioner, who was involved in the shooting, the Philadelphia Inquirer reported that some of the townspeople thought the shooting might have been intentional. Id. at —, 422 A.2d at 628. The Police Commissioner sued the newspaper for libel. Id. at —, 422 A.2d at 627.
154. Compare id. at —, 422 A.2d at 630-31 (Judge Cavanaugh's view) with id. at —, 422 A.2d at 634-35 (Spaeth, J., concurring) (Judge Spaeth's view).
156. The case was heard by Judges Cavanaugh, Spaeth, and Hester. The lead opinion in Brophy was written by Judge Cavanaugh. Judge Spaeth concurred in the result. Judge Hester dissented, believing there to be a genuine issue of fact from which a jury could find actual malice. Id. at —, 422 A.2d at 642 (Hester, J., dissenting).
157. Id. at —, 422 A.2d at 630-31. The plaintiff argued that an opinion written by Judge Spaeth had adopted Judge Wright's approach requiring a judicial appraisal of the evidence. Id. at —, 422 A.2d at 630, citing Curran v. Philadelphia Newspapers, Inc., 261 Pa. Super. Ct. 118, 395 A.2d 1342 (1978). In Curran, Judge Spaeth observed that summary judgment in defamation cases was a "preferred procedure." 261 Pa. Super. Ct. at 126, 395 A.2d at 1346. Judge Spaeth also stated in Curran that the court must on a motion for summary judgment make a threshold inquiry into actual malice: Unless the court finds on the basis of pre-trial affidavits, depositions, and documentary evidence that the plaintiff can prove actual malice in the New York Times sense, it should grant summary judgment for the defendant. It is not enough for the plaintiff, in resisting summary judgment, to argue that there is a jury question as to malice; he must make a showing of facts from which malice may be inferred. Such an inference must be clear.
158. — Pa. Super. Ct. at —, 422 A.2d at 631-32. After quoting from both Guam and Nader, Judge Cavanaugh stated:

We find the rationale expressed by these courts persuasive and hold that a trial court confronted with a motion for summary judg-
A concurring opinion by Judge Spaeth argued that Judge Wright's articulation contemplated the application of normal summary judgment procedures. The preference for summary judgment arising out of the pre-Hutchinson cases was, in Judge Spaeth's view, a product of the "convincing clarity" burden of proof placed upon plaintiffs in actual malice defamation cases. In considering footnote nine, Judge Spaeth remarked:

I regard the effect of this footnote as speculative at best. The footnote did not articulate what "doubt" was felt, nor why, nor what different rule should be applied; it expressly stated that the issues involved in deciding upon a different rule were not before the court. For me, it would take much more than such a footnote to "cast in doubt" either the "vitality" of the cases or the power of the considerations that I have discussed.

Judge Cavanaugh rejected Judge Spaeth's opinion in Curran v. Philadelphia Newspapers, Inc., 261 Pa. Super. Ct. 118, 395 A.2d 1342 (1978), arguing that it espoused a view which differed from normal summary judgment procedure in that: 1) the trial judge is not required to view the evidence in the light most favorable to the nonmovant, and 2) the trial judge must be personally satisfied that actual malice can be shown with convincing clarity. — Pa. Super. Ct. at —, 422 A.2d at 632. For a discussion of Nader, see notes 125-37 and accompanying text supra.

Turning to the facts, Judge Cavanaugh affirmed the grant of summary judgment, believing that the allegedly defamatory article did not purport to reveal the facts, but only local opinion as to the events leading up to the shooting. Id. at —, 422 A.2d at 633-34.

Judge Spaeth argued that the view he adopted in Curran v. Philadelphia Newspapers, Inc., 261 Pa. Super. Ct. 118, 395 A.2d 1342 (1978), did not suffer from its citation to Judge Wright's Wasserman opinion. — Pa. Super. Ct. at —, 422 A.2d at 634-35 (Spaeth, J., concurring). In Judge Spaeth's view, both his Curran opinion and Wasserman required the evidence presented to be viewed in the light most favorable to the nonmovant. Id. For a discussion of Curran, see note 157 supra.

According to Judge Spaeth, his statement in Curran v. Philadelphia Newspapers, Inc., 261 Pa. Super. Ct. 118, 395 A.2d 1342 (1978), that summary judgment is a "preferred procedure" in defamation cases was a correct statement of the law. — Pa. Super. Ct. at —, 422 A.2d at 635-36 (Spaeth, J., concurring). While the manner in which the trial judge is to examine the evidence is the same as in other cases, the evidence so viewed, must be clear and convincing that actual malice can be shown. Id. at —, 422 A.2d at 637 (Spaeth, J., concurring).
IV. ANALYSIS AND CONCLUSIONS

Prior to Hutchinson, trial judges had frequently granted motions for summary judgment on the issue of actual malice to media defendants. The post-Hutchinson courts appear to have taken up the Nader approach as they attempt to reconcile footnote nine with prior case law. Under Nader, the trial judge must view the record in the light most favorable to the plaintiff and determine whether a reasonable jury could have found actual malice with convincing clarity.

It is submitted, however, that the Nader rule represents no substantial change from the prior case law. Few courts have actually followed Judge Wright's approach of judicial weighing of the evidence.

162. See note 60 supra.

163. The Supreme Court has recently pointed out that it has not decided whether the actual malice standard can be invoked by non-media defendants. Hutchinson v. Proxmire, 443 U.S. at 133 n.16. However, it is suggested that the proposition that the actual malice standard should not apply to non-media defendants could not stand. First, the New York Times Court found the actual malice standard to be required by both the freedom of the press and the freedom of speech. See 376 U.S. at 264. Second, the New York Times Court applied the actual malice standard to the non-media defendants as well as to the newspaper. Id. at 285. Cf. St. Amant v. Thompson, 390 U.S. 727 (1968) (actual malice test applied to defendant who was a candidate for public office whose defamatory remarks were televised); Rosenblatt v. Baer, 383 U.S 75 (1966) (actual malice test applied to defendant who was not employed by the media, but was a regular contributor). Third, the author of the Hutchinson opinion, Chief Justice Burger, has expressed doubt as to the existence of separate, exclusive rights for the press under the Constitution. First National Bank v. Bellotti, 455 U.S. 765, 797-802 (1978) (Burger, C.J., concurring). Burger's view is founded on the belief that the freedom of the press protects the right of citizens to disseminate their views to the public and that this right does not 'belong' to any definable category of persons or entities, but to all. Id. at 799-802 (Burger, C.J., concurring). Fourth, while several courts have held the actual malice standard to apply to both media and non-media defendants, no court has ever limited the protection to media defendants. R. Sack, supra note 4, at 228. See generally Robertson, supra note 41, at 215-22.

164. See, e.g., Yiamouyiannis v. Consumers Union of United States, Inc., 619 F.2d at 999. For a discussion of Yiamouyiannis, see notes 147-52 and accompanying text supra.

165. See notes 121-61 and accompanying text supra.

166. Nader v. de Toledano, 408 A.2d at 44. For a discussion of post-Hutchinson cases which rely on Nader, see notes 139-61 and accompanying text supra. See also DeRoburt v. Gannett Co., 83 F.R.D. 574 (D. Hawaii 1979); Howard v. Des Moines Register and Tribune Co., 283 N.W.2d 289 (Iowa 1979); Berkey v. Delia, 287 Md. 302, 413 A.2d 170 (1980).

167. For a discussion of the prior case law, see notes 74-107 and accompanying text supra. It is suggested that few courts, if any, have actually deviated from normal summary judgment procedures in determining the issue of actual malice. See notes 134-57 and accompanying text supra. Thus it appears that the Nader majority did indeed create a false conflict by suggesting that there was a line of cases in which the trial judge made a personal appraisal of the evidence. See id. Notwithstanding this error in rationale, the conclusion of the Nader court is firmly supported by reasoned case law.
The approach originally articulated by Guam, and now reaffirmed by Nader, has always commanded the approval of the majority of jurisdictions. Because footnote nine has aroused the attention of the appellate judiciary, however, it is submitted that trial judges can no longer count on cursory review of their grants of summary judgment to defamation defendants. Thus, as a practical matter, summary judgment will now only be granted after the trial judge takes a “hard look” at all the evidence adduced and can find no basis upon which a jury could find actual malice.

The post-Hutchinson courts thus continue to apply the convincing clarity aspect of New York Times to summary judgment motions. It is possible, however, that footnote nine was intended to require more than just neutrality in procedure and that it was the intent of the footnote to eliminate “convincing clarity” as a consideration at the summary judgment level. Such an approach would recognize that the

168. For a discussion of cases which purport to follow Judge Wright’s approach, see notes 88-92 and accompanying text supra.

169. See Nader v. de Toledano, 408 A.2d at 60-61 (Harris, J., concurring in part and dissenting in part). See also Comment, Public Figure Defamation: Preserving Summary Judgment to Protect Free Expression, 49 Fordham L. Rev. 112, 128 (1980); Note, Constitutional Law—First Amendment—In a Public Figure Libel Action, An Absolute First Amendment Privilege Forbids Compelled Disclosure of a Defendant Newsmen’s Editorial Process, 47 Geo. Wash. L. Rev. 286, 315 n.163 (1978) (noting the decision of the Second Circuit in Herbert v. Lando, 568 F.2d 974 (2d Cir. 1977), rev’d, 441 U.S. 153 (1979)).

170. For a discussion of cases which consider the effect of footnote nine, see notes 124-61 and accompanying text supra.


Summary judgment will now safely be granted . . . only after it is shown that a sufficient opportunity for discovery has been permitted, and only after the trial judge has made a detailed evaluation of the evidence . . . . Few judges at any level can be expected consistently to make this kind of effort, even to prevent harassment of individuals engaged in protected speech. 492 F. Supp. at 379 (citation omitted).

In addition to scrutinizing the evidence closely, the trial judge must also determine that the plaintiff has had ample time to utilize discovery to ascertain the crucial evidence of the defendant’s state of mind. Id. See Yiamouyiannis v. Consumers Union of United States, Inc., 619 F.2d at 940; National Ass’n of Government Employees, Inc. v. Central Broadcasting Corp., — Mass. at —, 396 N.E.2d at 1004. However, the trial judge must also consider the chilling effect of burdensome discovery on the defendant, and in this regard should use its power to restrict discovery. Herbert v. Lando, 441 U.S. 153, 180 (1979) (Powell, J., concurring).

172. For a discussion of New York Times, see notes 34-48 and accompanying text supra.

173. For a discussion of the post-Hutchinson cases, see notes 124-61 and accompanying text supra.

174. See cases cited in note 118 supra.
plaintiff can best prove his case if he can cross-examine the defendant in front of a jury.\textsuperscript{175} It is submitted, however, that failure to apply the convincing clarity standard to summary judgments would emasculate \textit{New York Times}.\textsuperscript{176} The \textit{New York Times} decision was based on the Court’s recognition that self-censorship could result from fear of liability for defamation.\textsuperscript{177} Therefore, it would seem inconsistent to fail to apply \textit{New York Times}, including the convincing clarity test, at every stage in the proceedings in which liability may be determined.\textsuperscript{178} Moreover, the application of convincing clarity at the summary judgment stage would also ameliorate any “chilling” effect resulting from fear of bearing the expense of a trial.\textsuperscript{179}

Although they have deviated from their previous practice to some degree in recognition of footnote nine by requiring that the evidence presented on a motion for summary judgment be given careful consideration, the post-\textit{Hutchinson} cases have held onto the \textit{Guam} articulation of the standard to be applied to the evidence. They have properly refused to accept, it is submitted, a reversal of the well-established prior practice without a clearer, more authoritative enunciation by the Supreme Court.\textsuperscript{180}

The Supreme Court used its \textit{Hutchinson} footnote to criticize the widespread practice in the lower courts of granting summary judgment to defamation defendants.\textsuperscript{181} However, the lower courts, faced with the convincing clarity mandate of \textit{New York Times}, have found no way in which to pay due regard to the \textit{Hutchinson} footnote without abandoning \textit{New York Times}.\textsuperscript{182} The post-\textit{Hutchinson} decisions, while expressing agreement with footnote nine, have in effect circumvented its intent on the basis of the long line of authorities supporting the notion that summary judgment must be granted in favor of defamation.\textsuperscript{183}

\begin{footnotes}
\item 175. Hutchinson v. Proxmire, 443 U.S. at 120 n.9. For a further discussion of \textit{Hutchinson}, see notes 108-20 and accompanying text \textit{supra}. For the text of footnote nine, see text accompanying note 21 \textit{supra}. See also note 74 \textit{supra}.
\item 176. For a discussion of the convincing clarity standard, see note 45 \textit{supra}.
\item 177. For a discussion of \textit{New York Times}, see notes 34-48 and accompanying text \textit{supra}.
\item 178. The convincing clarity standard, it is submitted, is inexorably tied to the actual malice standard, and has become part and parcel of the liability test. For a discussion of convincing clarity, see note 45 \textit{supra}.
\item 179. For a discussion of the chilling effect of trial, see notes 13-15 & 83-86 and accompanying text \textit{supra}.
\item 181. For a discussion of \textit{Hutchinson}, see notes 108-20 and accompanying text \textit{supra}. For a discussion of the widespread practice, see note 86 and accompanying text \textit{supra}.
\item 182. For a discussion of \textit{New York Times}, see notes 34-48 and accompanying text \textit{supra}.
\item 183. See notes 125-61 and accompanying text \textit{supra}.
\end{footnotes}
defendants where the plaintiff does not offer proof of actual malice with convincing clarity.\textsuperscript{184}

While it is unclear just how far the Burger Court might go in restricting \textit{New York Times} and its progeny, the tone of footnote nine does not augur well for future media defendants.\textsuperscript{185} However, for now, any alteration in the practice of granting summary judgments must await further clarification by the Supreme Court, in a manner more persuasive than a single footnote.\textsuperscript{186}

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\textsuperscript{184} For a discussion of the post-\textit{Hutchinson} cases, see id.
\textsuperscript{185} See note 19 supra.
\textsuperscript{186} See note 180 and accompanying text supra.